Supreme Court, U.S.
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No. _____

In The

# Supreme Court of the United States

NICHOLAS WILLIAM PARADISE, JULIA ANN PARADISE, WILLIAM MICHAEL PARADISE, JULIE ANN PARADISE, EDWARD DONALD ("BUD") KUBALL,

*Petitioners,*

vs.

TRANS WORLD AIRLINES, INC.,

*Respondent.*

**On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Nevada**

## PETITION FOR WRIT OF CERTIORARI

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28pp

## QUESTIONS PRESENTED

Can the Nevada Supreme Court ignore an Order and Chapter 11 Reorganization Plan issued by the United States Bankruptcy Court for the District of Delaware as confirmed in a separate bankruptcy proceeding and Chapter 11 Reorganization Plan issued by the United States Bankruptcy Court for the Eastern District of Missouri, Eastern Division, which stayed the adjudication and litigation of any prepetition claim in any non-bankrutpcy court?

Can the Nevada Supreme Court affirm the dismissal of the Paradise family's prepetition claim against TWA for the Paradise family's failure to bring their prepetition claim to trial in the Nevada district court within the time allowed by the Nevada Rules of Civil Procedure even though (1) the automatic stay provided for by Section 362 of the Bankruptcy Code was never lifted, (2) TWA never filed with the Nevada district court the notice required by the Order of the Untied States Bankruptcy Court for the District of Delaware and, (3) the Paradise family's claim against TWA was and is governed by the Reorganization Plan issued by the United States Bankruptcy Court for the Eastern District of Missouri, Eastern Division?

## PARTIES TO THE PROCEEDING

The parties to the instant proceeding are Nicholas William Paradise, Julia Ann Paradise, William Michael Paradise, Julie Ann Paradise and Edward Donald ("Bud") Kuball (collectively referred to as "the Paradise family"), who are the petitioner's herein and the appellants/plaintiffs below, and Trans World Airlines, Inc. ("TWA"), which is the respondent herein and the respondent/defendant below. Other parties to the Nevada state court proceedings below, Marlene Zychowicz, Sherry Richardson-Crawford, Las Vegas Metropolitan Police Department, Gloria Johnson Powell and Mary Josephine Spencer, are not parties to the instant proceeding.

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## PETITION FOR WRIT OF CERTIORARI

Petitioners, the Paradise family, respectfully request that a writ of certiorari be issued to review the judgment of the Supreme Court of the State of Nevada ("Nevada Supreme Court"), in the case of *Nicholas William Paradise, Julia Ann Paradise, William Michael Paradise, Julie Ann Paradise, and Edward Donald "Bud" Kuball v. Marlene Zychowicz and Trans World Airlines*, Case No. 35672, as that judgment pertains to the Paradise family's claim against TWA.

## OPINION BELOW

The Nevada Supreme Court's Order of Affirmance was filed on August 10, 2001, and affirmed the state district court's order granting its own Motion to Dismiss with Prejudice Pursuant to NRCP 41(e). Nevada Advance Opinion 35672 (2001).

## STATEMENT OF JURISDICTION

The Nevada Supreme Court's Order of Affirmance was filed on August 10, 2001.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257.

## CONSTITUTIONAL AND STATUTORY PROVISIONS

Supremacy Clause, Article VI, Section 2 of the United States Constitution:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, and Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

11 U.S.C. § 108(c):

> Except as provided in section 524 of this title, if applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period for commencing or continuing a civil action in a court other than a bankruptcy court on a claim against the debtor, or against an individual with respect to which such individual is protected under section 1201 or 1301 of this title, and such period has not expired before the date of the filing of the petition, then such period does not expire until the later of –
>
> > (1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or
> >
> > (2) 30 days after notice of the termination or expiration of the stay under section 362, 922, 1201, or 1302 of this title, as the case may be, with respect to such claim.

11 U.S.C. § 362(a):

> Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under

section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of –

> (1) the commencement or continuation, including the issuance of employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title.

## STATEMENT OF THE CASE

As a result of a contested divorce proceeding and allegations initially made by William's estranged wife, the Paradise family was arrested and charged with 49 counts of child sexual abuse in February, 1984. Despite an extensive search of the Paradise family residences by the police and extensive coaching of William's four-year-old daughter by her "therapist," the charges were all dismissed at a preliminary hearing after the State failed to present any admissible evidence. William's sister, Julie, and her boyfriend, Bud, worked for TWA as a flight attendant and pilot. After the charges were dismissed, Julie and Bud were fired by TWA. They litigated their terminations in arbitration and prevailed. During the arbitration and as a means to booster its case, TWA presented evidence from its "experts" and worked hand in hand with the prosecution to have the Paradise family twice indicted before the Grand Jury. The indictments were dismissed, and the prosecution finally ended in

October, 1987. The Paradise family then sued the estranged wife, the therapist and TWA for malicious prosecution.

During the pendency of the Paradise family's suit, TWA declared bankruptcy. No notice lifting the bankruptcy stay was ever filed with the state district court, and TWA consistently maintained that the Paradise family's suit was stayed by orders of the Bankruptcy Courts in Delaware and Missouri and the Reorganization Plans adopted by those courts. About a million dollars in bonds is still being held in trust pursuant to the Missouri Reorganization Plan to satisfy the Paradise family's disputed, unliquidated claim.

Nevada has a rule requiring all cases to go to trial within five years of filing or within three years after being remanded by the Nevada Supreme Court. Because the Paradise family had to win an initial appeal, the three-year-after-remand rule is the one applicable to the present case.

In January, 2000, upon the state district court's motion, the Paradise family's claim against TWA was dismissed under the three-year rule. Upon appeal, the Nevada Supreme Court affirmed the district court's decision finding that the Paradise family *could have* adjudicated their claim in bankruptcy court, or *could have* entered into a stipulation with TWA to liquidate their claim in state court, or *could have* renewed their claim during the 30-day window following the close of TWA's bankruptcy.

In truth in fact, litigating the Paradise family's claim in the Delaware Bankruptcy Court was not a viable

option because all the witnesses were in Nevada. The only stipulation TWA would have agreed to was purely illusionary since it allowed TWA to invoke the automatic stay any time TWA incurred any costs. Renewing the claim was never an option since TWA never served notice that the Delaware bankruptcy closed. TWA's bankruptcy was always governed by the reorganization plans which specifically set aside assets to satisfy disputed claims.

## REASONS FOR GRANTING THE WRIT

The Nevada Supreme Court's decision affirming the district court's dismissal of the Paradise family's claim against TWA directly conflicts with the Order and Chapter 11 Reorganization Plan issued by the United States Bankruptcy Court for the District of Delaware as confirmed in a separate bankruptcy proceeding and Chapter 11 Reorganization Plan issued by the United States Bankruptcy Court for the Eastern District of Missouri, Eastern Division.

The courts of the several states, federal appellate circuits and bankruptcy courts are in conflict whether a bankruptcy stays the running of a state's limitation periods.

In the case of *In re Knutson*, 237 B.R. 886, 890 (Bkrtcy. N.D. Miss. 1999), the Bankruptcy Court for the Northern District of Mississippi held that the Mississippi two-year statute of limitations applicable to medical malpractice actions was stayed by the bankruptcy filing of the defendant doctor.

In the case of *Don Huddleston Construction Company v. United Bank and Trust Company of Norman, Oklahoma*, 933 P.2d 944, 947 (1996), the Court of Appeals of Oklahoma, Division No. 3, held that the bankruptcy statute does not, in and of itself, stay the running of any statutory periods for bringing or continuing suit.

In the case of *In re Carolina Steel*, 179 B.R. 413, 417 (Bkrtcy. S.D.N.Y. 1995), the United States Bankruptcy Court for the Southern Division of New York held that the bankruptcy act, in and of itself, acts to toll the limitations period.

In the case of *In re Morton*, 866 F.2d 561, 565 (2nd Cir. 1989), the United States Court of Appeals for the Second Circuit held that the bankruptcy act, in and of itself, acts to toll the limitations period.

In the case of *Thurman v. Tafoya*, 895 P.2d 1050 (Colo. 1995), the Colorado Supreme Court held that the bankruptcy act, in and of itself, does not act to toll the limitations period.

In the case of *Statewide Funding Corp. v. Reed*, 925 P.2d 578, 580 (Oak.App. 1996) the Court of Appeals of Oklahoma, Division No. 4, held that the bankruptcy act, in and of itself, does not act to toll the limitations period.

In the present case, the Nevada Supreme Court held that all nonbankruptcy court proceedings were not halted on account of the automatic stay provided for by 11 U.S.C. § 362(a).

This Court needs to resolve the conflict between the various state courts, federal appellate circuit and bankruptcy courts with respect to whether or not a bankruptcy stay tolls limitation periods for prosecuting state claims. Definitive guidance is needed in this important area of national inquiry, and this Court needs to clarify whether state courts will be allowed to violate the Supremacy Clause of the United States Constitution, 11 U.S.C. § 362(a), and the stay orders incorporated into reorganization plans approved by the federal bankruptcy courts.

## CONCLUSION

The Paradise family respectfully requests that this Court grant this petition for writ of certiorari to review the merits of the Nevada Supreme Court's Order of Affirmance below.

Respectfully submitted,

CARL E. LOVELL, JR.
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*Attorney for Petitioners*
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## APPENDIX A

IN THE SUPREME COURT OF THE STATE OF NEVADA

| | |
|---|---|
| NICHOLAS WILLIAM PARADISE, JULIA ANN PARADISE, WILLIAM MICHAEL PARADISE, JULIE ANN PARADISE, AND EDWARD DONALD "BUD" KUBALL,<br><br>Appellants,<br><br>vs.<br><br>MARLENE ZYCHOWICZ AND TRANS WORLD AIRLINES,<br><br>Respondents. | No. 35672<br><br>(Filed Aug. 10, 2001) |

ORDER OF AFFIRMANCE

This is an appeal from an order dismissing the complaint for failure to bring the case to trial within three years after remand. Appellants also challenge the district court's order denying summary judgment.

On appeal, appellants contend that the bankruptcy stay involving TWA has never been lifted. Therefore, the district court was prohibited from dismissing appellants' claim under NRCP 41(e) since appellants were not yet able to proceed against TWA or Marlene Zychowicz so long as the stay remained in effect. We disagree, and accordingly, we affirm the determination of the district court.

"Pursuant to NRCP 41(e), a court must dismiss an action 'unless such action is brought to trial within five years after the plaintiff has filed his action, except where the parties have stipulated in writing that the time may be extended.' "[1] "The five-year rule is intended to compel expeditious determinations of legitimate claims."[2] "Dismissal after five years is mandatory and the only discretionary aspect of the dismissal is whether it is with or without prejudice."[3]

In addition to the five-year mandatory prosecution rule, NRCP 41(e) also addresses prosecution of a case following remittitur. Specifically, the rule holds that "[w]hen in an action after judgment, an appeal has been taken and judgment reversed with cause remanded for a new trial . . . the action must be dismissed by the trial court . . . unless brought to trial within *three years* from the date upon which remittitur is filed."[4] Although the language in this regard addresses the situation in which a cause of action is remanded for a new trial, this court has "held that a district court may accord the same three-year limit in which to bring an action to trial in the first

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[1] *Baker v. Noback*, 112 Nev. 1106, 1110, 922 P.2d 1201, 1203 (1996) (citing NRCP 41(e)).

[2] *Id.* (citing *C.R. Fedrick, Inv. v. Nevada Tax Comm'n*, 98 Nev. 387, 389, 649 P.2d 1372, 1374 (1982)).

[3] *Id.* (citing *Home Sav. Ass'n v. Aetna Casualty & Sur. Co.*, 109 Nev. 558, 563, 854 P.2d 851, 854 (1993)).

[4] NRCP 41(e) (emphasis added).

instance after remand."[5] The standard of review for a rule 41(e) dismissal is that of abuse of discretion.[6]

In this instance, we conclude that the district court did not abuse its discretion in dismissing appellants' claim as to either TWA or Zychowicz. Appellants were afforded five years from the date of June 1, 1988 – or three years from the date of our remand on December 20, 1990 – to bring its case to trial against respondents. Under either rule, they failed to bring this action by the prescribed date.

As to TWA – although 11 U.S.C. § 362 provided for an automatic stay when TWA declared bankruptcy in 1992, we disagree with appellants that all proceedings were halted on account of this declaration. To the contrary, appellants could have adjudicated their claim in bankruptcy court;[7] they could have adjudicated their claim in Nevada state court after entering a stipulation to that effect;[8] or they could have renewed their claim during the 30-day window following the close of TWA's

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[5] *Bell & Gossett Co. v. Oak Grove Investors*, 108 Nev. 958, 961, 843 P.2d 351, 353 (1992) (citing *McGinnis v. Consolidated Casinos Corp.*, 97 Nev. 31, 623 P.2d 974 (1981)).

[6] *See Northern Illinois Corp. v. Miller*, 78 Nev. 213, 370 P.2d 955 (1962).

[7] 11 U.S.C. § 157(c).

[8] The bankruptcy court entered an order in June 1992 establishing procedures to modify the automatic stay with respect to litigation on insured claims. Appellants were made known of this order on two separate occasions, but they failed to sign a stipulation that would have enabled them to litigate the claim in Nevada district court.

bankruptcy.[9] But instead of engaging in any of these options, appellants did nothing.

Nevada has no tolling period regarding time limitations under NRCP 41(e) unless the parties are "prevented from bringing an action to trial by reason of a court-ordered stay."[10] Because appellants had viable options for bringing their action to trial as provided for in the bankruptcy court orders, any tolling period of NRCP 41(e) does not apply. As to respondent Zychowicz, we conclude that TWA's automatic stay had no bearing on appellants' ability to prosecute their case against the therapist.[11] Accordingly, appellants were required to bring their case to trial against Zychowicz no later than December 20, 1993.

Appellants contend that the filing of a summary judgment motion against Zychowicz constituted bringing the case to trial, thereby satisfying the three-year remand rule. However, we conclude that this contention is without merit. Specifically, this court has held that "the denial of a motion for summary judgment merely involves a finding that there remain triable issues of fact."[12] Thus, losing a motion for summary judgment "is not a trial."[13]

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[9] 11 U.S.C. § 108(c).

[10] *Baker*, 112 Nev. at 1110, 922 P.2d at 1203 (citing *Boren v. City of North Las Vegas*, 98 Nev. 5, 638 P.2d 404 (1982)).

[11] *See Sav-A-Trip, Inc. v. Belfort*, 164 F.3d 1137 (8th Cir. 1999) (holding that, absent unusual circumstances, the automatic stay of § 362 does not extend to co-defendants).

[12] *United Ass'n of Journeymen v. Manson*, 105 Nev. 817, 820, 783 P.2d 955, 957 (1989).

[13] *Id.*

Conversely, "the submission of a motion for summary judgment which is subsequently granted constitutes bringing an action to trial."[14]

Here, the motion for summary judgment against Zychowicz was denied by the district court. Therefore, appellants' pre-trial efforts against Zychowicz were insufficient to confer "trial" status on the proceeding.

Having considered all other issues raised on appeal by appellants, and having determined those issues are without merit, we

ORDER the judgment of the district court AFFIRMED.

/s/ Young, J.
Young

/s/ Leavitt, J.
Leavitt

/s/ Becker, J.
Becker

cc: Hon. Valorie Vega, District Judge
Kossack Law Offices
Seyfarth, Shaw, Fairweather & Geraldson,
Denton & Lopez, Ltd.
Marlene Zychowicz
Clark County Clerk

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[14] *Id.* at 817, 783 P.2d at 956.

## APPENDIX B

## DISTRICT COURT
## CLARK COUNTY, NEVADA

| | |
|---|---|
| NICHOLAS W. PARADISE, et al.,<br><br>Plaintiff,<br><br>vs.<br><br>TRANS WORLD AIRLINES INC., et al.,<br><br>Defendant. | Case No. A-265574<br><br>Department No. Two<br>Docket No. "D"<br><br>Date of Hearing: January 24, 2000<br>Time of Hearing: 10:00 A.M.<br><br>(Filed Jan. 28, 2000) |

### ORDER

Court's Motion to Dismiss having come on for hearing in Department No. 2 on the 24th day of January, 2000, the HONORABLE VALORIE J. VEGA presiding; ROBERT J. KOSSACK, ESQ. appearing on behalf of the Plaintiff and MARLENE ZYCHOWICZ appearing in pro se; the Court having reviewed the papers and pleadings on file herein, having heard oral argument, and having considered the matter, does hereby find with good cause appearing therefor,

That this case was filed initially in 1988 and is one of the oldest cases in time on this Court's current active docket;

FURTHER, the bankruptcy stay was lifted and the bankruptcy has now been closed and, by operation of

law, the case against Trans World Airlines has been extinguished through that bankruptcy proceeding.

FURTHER, the Plaintiff had the duty to use diligence at every stage of the proceeding and has failed to do so; a deposition which began eight (8) years ago has still not been completed, and the Plaintiff has failed in its affirmative duty to prosecute. Therefor,

**IT IS HEREBY ORDERED** that the Motion to Dismiss with Prejudice is granted pursuant to NRCP 41(e), and the case is closed

**DATED** this 27th day of January, 2000.

/s/ VALORIE J. VEGA
VALORIE J. VEGA, District Judge

CERTIFICATE OF MAILING

I hereby certify that on the 28th day of January, 2000, I mailed a copy of this order to the following attorneys or parties in proper person:

ROBERT J KOSSACK ESQ
4535 W SAHARA AVE #101
LAS VEGAS NV 89102

RALPH L DENTON ESQ
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LAS VEGAS NV 89101

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1725 S RAINBOW BLVD
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/s/ Delores A. Grimm
Delores A. Grimm, Judicial
Executive Assistant

## APPENDIX C

## DISTRICT COURT
## CLARK COUNTY, NEVADA

| | |
|---|---|
| NICHOLAS WILLIAM PARADISE, et al., Plaintiff, vs. LAS VEGAS METROPOLITAN POLICE DEPARTMENT, et al., Defendant. | Case No. A-265574<br>Department No. II<br>Docket No. "D"<br>(Filed Dec. 2, 1999) |

**MOTION TO DISMISS WITH PREJUDICE PURSUANT TO NRCP 41(e)**

It appearing to the Court that the above-entitled case has not been brought to trial within five (5) years after commencement thereof, and

It also appears to the Court that on May 3, 1994, Plaintiff was allowed an additional three hundred twelve (312) days pursuant to NRCP 41(e); however, the case was never brought to trial and should have been dismissed in 1995.

It also appears to the Court that this case was closed per Department 8 on June 2, 1997 and should have remained closed. According to the Court minutes, the case was somehow reactivated on August 24, 1998 during a reassignment from Judge Lee A. Gates to Judge Sally Loehrer.

NOW, THEREFORE, the Court, upon its own motion, pursuant to NRCP 41(e), shall dismiss all unadjudicated

claims with prejudice at the hour of **10:00 a.m.** on the **10th day of January, 2000,** in Department No. 2. If any party has legal cause or reason why this matter should not be summarily dismissed, written opposition must be filed with the Court and a courtesy copy immediately delivered to chambers by 5:00 p.m. on Wednesday, December 29, 1999.

**DATED** this 2nd day of December, 1999.

/s/ Valorie J. Vega
VALORIE J. VEGA, District Judge

## APPENDIX D

**ROBERT J. KOSSACK, ESQ.**
**KOSSACK LAW OFFICES**
4535 WEST SAHARA, SUITE 101
LAS VEGAS, NV 89102

Telephone: (702) 253-7068
Facsimile: (702) 368-0471

April 29, 1996

Mark R. Denton, Esq.
Denton and Denton, Ltd.
326 South Seventh Street
Las Vegas, Nevada 89101

**RE: Paradise v. Trans World Airlines**
**Case No. A 265574**

Dear Mr. Denton:

Please be advised I have been informed by the Paradise family's bankruptcy attorney in St. Louis, Sandy F. Louis, that the TWA Chapter 11 Reorganization proceeding does not prohibit us from continuing in the above-entitled state court litigation on behalf of the Paradise family where our doing so is for the purpose of determining the amount of the Paradise family claim.

After confirmation of the plan, Section 524 of the Bankruptcy Code continues to impose an injunction against any acts to enforce a claim against TWA, but does not prohibit us from taking or continuing any action or proceeding merely to determine the amount of the claim. Once the amount of the claim is liquidated, collection or

payment of the claim can occur only as permitted under the Reorganization Plan or from insurance proceeds.

Section 11.3 of the Confirmed Plan of Reorganization states in pertinent part:

> . . . each Holder of a claim may, to the extent permitted by and in accordance with the provisions of the Plan, commence or continue any action or proceeding to determine the amount of its Claim in the Bankruptcy Court or any other court of competent jurisdiction, and all Holders of Claims shall be entitled to enforce their rights under the Plan and the Plan Documents.

In light of Section 11.3 of the Confirmed Plan of Reorganization, I cannot understand why TWA has not filed with the state court and served upon this office a notice that the stay previously imposed had been lifted.

Our present efforts to settle this case through the bankruptcy forum with TWA's bankruptcy counsel have been delayed due to a change of TWA bankruptcy attorneys, and it is my understanding that other claimants in the bankruptcy forum may be considering trying to have our claim dismissed for failure to prosecute. Therefore, I do not think we can rely on litigating the Paradise family's claim in the bankruptcy forum and still protect all of the Paradise family's rights.

At any rate, it is our intention at this time to proceed with the above-entitled case in the Eighth Judicial District Court, Clark County, Nevada. Presently, TWA needs to respond to the NRCP 16.1 document requests served upon them at the early case conference. My present plan

is to notice a status check before the Discovery Commissioner.

If you believe there is some reason the bankruptcy proceeding otherwise prohibits this action, please notify me of your objection immediately, and please advise me whether TWA still has the same out of state counsel handing [sic] this case.

Sincerely,

/s/ Robert J. Kossack
Robert J. Kossack, Esq.

RJK/mp

**RECEIPT OF ORIGINAL**

**RECEIPT** of the original of the foregoing letter is hereby acknowledged this 29th day of April, 1996.

DENTON AND DENTON, LTD.

By /s/ Mark R. Denton/SS
MARK R. DENTON, ESQ.
Nevada Bar No. 000194
326 South Seventh Street
Las Vegas, Nevada 89101

## APPENDIX E

LAW OFFICES OF
BRONSON, BRONSON & MCKINNON

505 MONTGOMERY STREET
SAN FRANCISCO, CALIFORNIA 94111-2514
TELEPHONE (415) 986-4200

April 30, 1996

VIA FACSIMILE AND U.S. MAIL

Robert J. Kossack, Esq.
Kossack Law Offices
4535 West Sahara, Suite 101
Las Vegas, Nevada 89102

Re: *Paradise v. Paradise*

Dear Mr. Kossack:

Your letter to Mark Denton of April 29, 1996 has been referred to me for a response.

As you correctly note, claims in the bankruptcy court *may* be liquidated outside the bankruptcy court "to the extent permitted by and in accordance with the provisions of the plan." As you previously have been informed, permission to liquidate your claim outside the bankruptcy court must be obtained from the bankruptcy judge. In order to obtain that permission, a stipulation has to be filed in which the claimant agrees to several provisions, one of which is not to execute against TWA in any manner that is contrary to the Plan of Reorganization. I informed you of these procedures in January of 1993, but did not hear further from you. As a result, the federal injunction against your proceeding in state court remains in full force and effect.

Until the required stipulation is signed and approved by the bankruptcy court, the federal injunction bars you from proceeding in the manner indicated in your letter.

If you have any questions on these matters, please be sure to give me a call.

Very truly yours,

/s/ Gilmore F. Diekmann, Jr.
Gilmore F. Diekmann, Jr.

GFD:sh

cc: Mark Denton